UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

In the matter of :	
CHEMICAL SOLVENTS, INC.,	CASE NOS. 8-CA-39218
Employer	8-CA-39277
and	8-CA-39300
	8-CA-39335
TEAMSTERS LOCAL UNION 507	8-CA-39362
A/W INTERNATIONAL BROTHERHOOD	8-CA-39412
OF TEAMSTERS,	8-CA-61979
Petitioner	

RESPONDENT'S ANSWER BRIEF TO EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL AND BRIEF IN SUPPORT

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A. THE ALJ DID NOT ERR IN FINDING THE CLOSING OF THE RESPONDENT'S TRUCKING DEPARTMENT DID NOT VIOLATE SECTION 8(A)(3) OF THE ACT

After first determining that the Acting General Counsel (hereinafter "General Counsel") had made out a prima facie case that Respondent had violated 8(A)(3) by laying off its drivers in response to certain protected activities, the ALJ then concluded the Respondent had met its burden of persuasion under *Wright Line* demonstrating that the same action would have taken place in the absence of the protected conduct. (JD 41: 7-9). In reaching this conclusion, the ALJ noted that the "credited testimony of Haas and Debevec" played a "substantial part" in his determination. (JD 41: 9, 10) Recognizing that the Board's established policy is to not overrule credibility resolutions absent extraordinary circumstances and unless the clear preponderance of all the relevant evidence convinces the Board the those resolutions are incorrect, the General Counsel largely sidesteps the ALJ's comment on the role these two witnesses played in his decision making and instead proffers all the reasons why their testimony should not really matter. However, as will be explained herein, the role which this uncontradicted "credited testimony" played must be acknowledged since the ALJ himself indicated it played a substantial part in his decision that the company would have closed the trucking department even in the absence of the protected conduct.

Chris Haas is the President and Chief Executive of All Pro Freight Systems, a large multi state trucking firm headquartered in Avon, Ohio. (Tr. 868, 869) His testimony indicated he first began discussing performing trucking for Respondent in March, 2009 with Jerry Schill, Respondent's Operations Manager. (Tr. 870) Haas recalled that from their very first meeting in the spring of 2009 Schill indicated interest in the notion of All Pro taking over all of CSI's

trucking needs. (Tr. 885) Haas had called Schill because Haas had learned through Schill's son that Schill was looking for new trucking servicers. (The ALJ did indeed misunderstand whose "son" conveyed this information to Haas, incorrectly concluding the "son" referred to by Schill was Ed Pavlish's son, John. The General Counsel has it correct that the "son" who spoke to Haas was actually Schill's son. General Counsel makes much of this mistake by the ALJ, but it really has no bearing on the matter. No matter who contacted Hass initially, it is the substance of Haas and Schill's discussions in March, 2009, which really matter.) In any event, these first discussions between Haas and Schill for All Pro to perform the company's trucking operations therefore took place nearly two years before Respondent finally notified the union in January, 2011 that it had determined to close its trucking department and prior to any protected activity that could reasonably form the basis for a retaliation claim.

The timing of these first discussions - and Haas' credibility in discussing them at the hearing - is important because both Ed Pavlish and Jerry Schill testified that Pavlish had instructed Schill in the spring of 2009 to go out and find a suitable trucking firm to take over the trucking needs of the company. (Schill, Tr. 984; Pavlish, Tr. 1210) As Pavlish explained at the hearing, he had decided the company's trucking department was losing too much money, he wanted to put his capital into new mixing equipment for certain new high profit products rather than for new trucking equipment, and he had decided to close the trucking department as a result. (Tr. 1204-1205) While the ALJ concluded that Pavlish's testimony that he had made this decision in February, 2009 was not credible, whether such decision was made by Pavlish in February or in March, 2009 does not really matter; what is important is that Haas' recollections of his first discussions with Schill in the spring of 2009 is consistent with Respondent's claim

that a decision to close the trucking department was made long before any of the protected activities of the union in the fall of 2010. Both Haas' and Pavlish's testimony on this issue are uncontradicted.

In addition, Haas testified to a subsequent series of meetings and phone calls with Schill and other individuals for both companies over the ensuing months, designed to garner more and more information for both parties to enable them to reach a possible contract. (Tr. 873-877, 884) Haas testified that such prolonged and sporadic discussions to gain the CSI business were not at all unusual in his experience, stating that he had previously worked over a year to gain a different client's entire trucking business. (Tr. 908, 909) As he put it, there was a lot of information and investigation necessary to obtain such a new account which was not, in his view, unusual. (Id.)

Haas further testified that he also desired to pick up some of CSI's existing trucking subcontracting work, even if CSI had not yet decided if All Pro was suitable for all its trucking work. Thus, All Pro secured some trucking work in November, 2009. (Tr. 879) It was this work that concerned the union drivers enough to ask for a meeting with Ed Pavlish in December, 2009. At such meeting, Pavlish indicated to the drivers he was exploring his options and would ultimately do what he believed "best" for his company. (Tr. 1024)

Haas also indicated that discussions continued with Schill throughout September, 2010, culminating in All Pro securing substantial CSI trucking work by November, 2010. He explained he then learned the cost of obtaining the necessary insurance to enable All Pro to also "back haul" hazardous wastes could not be justified and, without such backhauling work, his company was not in a position to completely take over CSI's trucking needs. (Tr. 895)

If credited as true, Haas' uncontradicted testimony established that CSI had for many months been interested in finding a suitable single source for its trucking needs, long before any of the protected activities occurred. His testimony also established that it was only a last minute glitch over All Pro's insurance issue, first discovered in November, 2010, which caused CSI to have to broaden its discussions with other carriers, CETCO and DisTech. This is consistent with Schill's recollections, as he testified that he came to recognize that CSI would need to find more than one carrier to accomplish all of its trucking needs. (Tr. 1079) Schill therefore commenced discussions with the other carriers in the late fall of 2010 in order to accomplish that task. (Tr. 988, 390, 391)

In addition to crediting Haas' testimony as a substantial factor in his decision making, the ALJ indicated he similarly considered and credited the uncontradicted testimony of the company's outside accountant, Bob Debevec, in reaching his decision that the company would have made the same decision to close the trucking department even in the absence of the protected activity. Debevec testified that in the spring of 2009, he prepared (as he had annually done since 2006) a summary of the company's trucking costs. (Tr. 1104-1108) He clearly told the ALJ that when he prepared his summary for Pavlish in the spring of 2009, he would have had the company's 2008 trucking costs. (Tr. 1107) As he stated "I would have been asked to prepare the 2008 information in February or March of 2009." (Tr. 1106) This credited testimony is important because the owner Ed Pavlish testified that he made the decision to close the trucking department "after I got my financials from the accountant" in 2009 "probably February." (Tr. 1201)

Accordingly, it must be recognized that the ALJ concluded from the corroborated and uncontradicted testimony that these two individuals had truthfully indicated the Respondent was focused on its substantial trucking costs in the spring of 2009 and immediately commenced efforts to eventually close its trucking department. Debevec's testimony established an analysis had been done by him of 2008 trucking costs in the early months of 2009 for management's review and Haas' testimony confirms that shortly thereafter CSI, through Jerry Schill, engaged him in a serious effort to find a single carrier to take over the company's trucking needs. Thus, even though the ALJ criticized some aspects of Ed Pavlish's and Jerry Schill's testimony, it seems that where their testimony was consistent with Haas' or Debevec, this consistency supported the notion that the company was seriously interested in terminating its trucking department long before any protected union activities occurred.

But it must also be recognized that the ALJ cited other reasons why he reached his conclusion, apart from Haas' and Debevec's respective testimony. Some of these other reasons directly address the arguments made by the General Counsel in her brief and some of his reasons are simply ignored in her analysis. First, the ALJ noted that the drivers were but 20% of the bargaining unit and that Respondent continues to employ 40 unit members. (JD 41: 12, 13) He further noted the Respondent had offered the drivers positions in the company in lieu of layoff. Respondent concludes these factors were cited by the ALJ because he recognized that these facts are not indicative of a company with a serious union animus. The company was indeed perfectly content to continue to employ these individuals, "albeit at a lower remuneration". Thus, the company was not trying to rid itself of what the General Counsel has characterized as "union activists." Unlike the facts in several of the cases cited by the General Counsel in her brief,

where employers attempted to prevent any union representation whatsoever in their midst, CSI was, and remains, a union shop after these layoffs and these particular drivers were welcome to remain in employment there.

The ALJ also found it worth noting that CSI had indeed "experimented" with contract drivers in November, 2009 and Pavlish thereafter told the drivers, who were concerned that CSI was going to terminate the trucking division, he was "testing the waters" as far as utilizing contract drivers and that he was going to do what was best for the company. (JD 41: 17, 18) Again, this evidence goes to show that long before the protected activities occurred in late 2010, the company was seriously contemplating and even using outside carriers, openly indicating to the drivers an intent to continue to explore that alternative. Obviously, these efforts were not in response to any protected activities; they preceded those activities by many, many months. And, as the ALJ further noted, the Respondent had, starting in 2009, "engaged in ongoing discussions with several contract carriers concerning contracting out such work and closing the trucking division." (JD 41: 19-21) The General Counsel does not attack this conclusion at all as the record does indeed clearly reflect discussions with All Pro and Thomas Trucking in 2009, with both firms actually performing bargaining unit work for CSI in 2009 and supplying CSI quotes for more work. Such evidence again clearly supports the ALJ's conclusion that this company was planning to close its trucking department long before the union engaged in its activities later in 2010.

The ALJ then directly rejected the General Counsel's contention that the protected activities motivated the Respondent to close its trucking department. He pointed out that of the three grievances filed prior to November 5, 2010 (the date that All Pro returned to commence

performing a substantial portion of the so-called "bargaining unit work") driver Zemaitis had filed two grievances and Griffith one. The ALJ further noted that two of these grievances were "specific to the employee and without ramification to the drivers in general" and that the third grievance preceded the "phase out" of the drivers by over a month. In other words, the ALJ took note that these grievances were, in the scheme of things, minor matters which could hardly rationally drive the company into such turmoil that it would immediately decide to close its longstanding trucking department.

Likewise, the ALJ evaluated the nature of the so-called "strike threats" which General Counsel vehemently claims further motivated the company to make a "hurried" decision to close its trucking department. While acknowledging that the record demonstrated Respondent's attorney's "dismay" that union representative Mixon had discussed with the union members on July 30, 2010 the potential for a strike if the health insurance issue could not be resolved, the ALJ also noted that Mixon did not tell Respondent there would be a strike, or even threaten that there would be a strike. Indeed, Mixon testified he specifically denied to Colaluca at their August 5, 2010 meeting concerning health insurance that he had even made any strike threats. (Tr. 615) The notes of the August 5, 2010 meeting taken by a union official indicate there was no discussion of "shutting Co. down" (sic), with the additional comment: "Don't know where that came from but not so". (Rspt. Ex. 152) Likewise, the ALJ noted there was no evidence that any employees "threatened or even mentioned" a strike at any time in 2010.

Thus, it is clear the ALJ fully grasped the arguments the General Counsel was making (and makes again in her brief in support of her exceptions): that certain grievances were filed shortly before All Pro began substantial hauling at CSI in November, 2010 and that a discussion

about a "strike" over the health insurance issue likewise occurred shortly before All Pro reappeared, yet the ALJ still determined it was "incredulous" "*in view of the above factors*" to conclude the filing of these particular grievances or Mixon's statements about strikes motivated Pavlish's decision to terminate the trucking division. The ALJ indicated such a reaction by Pavlish would "hardly have been reasonable" and that nothing in the record led the ALJ to believe that Pavlish would have had such an "overblown" reaction and would "have been more eager to retaliate against the drivers than in doing what was financially best for his company." (JD 42: 5-8) In other words, the ALJ ultimately weighed the credibility of Pavlish himself as the latter had testified that he had not closed down his trucking department in retaliation for the activities of the union. (Tr. 1218) Indeed, the ALJ even expressly stated: "I do credit Pavlish to the extent that I believe the motive behind closing the trucking operation was financial, rather than based on antiunion animus." (JD 38: 16, 17) This judgment concerning Pavlish's credibility on the retaliation issue cannot be put aside by this Board under its own well established policy, acknowledged by the General Counsel in her brief.

There is no doubt the General Counsel has put together a detailed chronology of events in her brief in order to try to undermine the administrative law judge's credibility conclusions. She has attempted to exploit events which occurred over a decade ago to demonstrate the company's animus by referencing ULPs which took place in the late 1990's. The ALJ clearly considered this history but found the events she cited "too remote in time to be considered probative." (JD 40:39-46) She has also attempted to use statements derogatory to the union which a night shift supervisor made to certain production employees *months after* the announcement that the

company was closing its trucking department as further evidence of animus, to support a retaliatory motive, against all logic.

But the ALJ made clear in his opinion that he had considered both the specific "protected activities" of the drivers and the timing of the commencement of the first substantial use of contract carriers in relation to those protected activities when he determined the company had met its *Wright Line* burden of demonstrating the closing of the trucking department would have taken place regardless of the occurrence of the protected activities. (JD 41: 23,-25) In order to discredit the ALJ's conclusion, the General Counsel cites Respondent's Jerry Schill's e mail exchanges in November, 2010 with an executive from one of the carriers, CETCO, wherein each indicated they did not want the new truck drivers to be union drivers. However, the decision demonstrates that the ALJ specifically considered this e mail and indeed, found it to be evidence of animus (JD 40: 36, 37) yet the ALJ still concluded Pavlish made the decision to close the trucking department for financial reasons, regardless of such animus within his ranks. Indeed, it could be argued that if Pavlish made his decision in spring of 2009 to close the trucking department, and all that remained was to decide who to give the business to, it does not matter if Schill exhibited an anti union attitude nearly two years later when selecting the new carrier or carriers.

What this ALJ was able to do was put the protected activities and their relation to Pavlish's decision in context. Finding evidence of a business decision by the owner to close the trucking department in the spring of 2009 due to financial considerations, commencement of various efforts by his top operations officer immediately thereafter to locate a suitable replacement carrier, and the owner's frank commitment to exploring such a route even when

confronted by nervous drivers in December, 2009, the ALJ was not swayed that a series of unrelated, somewhat insignificant grievances in early November, 2010, or a lingering dispute with the union over health insurance (which, for good or bad, had already been resolved by the company in September, 2010) actually motivated the commencement of the closing of the trucking department in January, 2011. The ALJ recognized that this is a company where labor peace had actually long endured, that the company was willing to absorb these drivers into its production facilities where the majority of the union employees are already engaged, and this is not a businessman bent on union destruction when he makes critical business decisions for his company. This Board should not substitute its judgment for the ALJ's judgment, which was based on findings of fact that are supported by the record as a whole, and which ultimately was a judgment on the credibility of the owner, Ed Pavlish, who testified on this matter at length, as well as Haas and Debevec.

This subject should not be left without responding to some of the other arguments General Counsel has advanced to support her claim the ALJ's decision was "astonishing." (Brief, page 18) For example, General Counsel claims repeatedly that Ed Pavlish threatened to close the company if the union had a strike, terming this as "critical evidence of anti-union animus." (Brief, page 18) Her brief claims that "Griffith, without contradiction, testified that with respect to future strike action", Ed Pavlish stated (in 2007 upon Griffith's return to CSI employment) that he would "close this place down tomorrow" and it would not affect Pavlish's life style. (Brief, page 10, citing pages 60-67 of the transcript) The Board is encouraged to review the testimony cited by General Counsel on this point because nowhere in the record does Griffith state Pavlish made this comment in response to a threat of a strike, or as a warning to not ever

conduct a strike. Indeed, there is no explanation offered by Griffith whatsoever as to what provoked such a comment. Perhaps Pavlish was merely indicating to Griffith that if the company could not operate successfully and Pavlish therefore chose to close it up, it would not change Pavlish's lifestyle. Indeed, there could have been a myriad of reasons why Pavlish wanted Griffith to know that the success of the company might be more important to the employees than to Mr. Pavlish personally, but General Counsel leaps to the conclusion that Pavlish was threatening to close it down *if there was ever a strike*. The testimony simply does not support this allegation or even an inference of such a threat.

The General Counsel also argues that the company's purchase of three new vehicles during 2009 and 2010 demonstrates the decision to close the trucking department was only made in response to the protected union activities, claiming it is "implausible to believe that Respondent would make such a large capital investment in its trucking operation at the same time it had purportedly made a decision to subcontract." (Brief, page 23) However, the General Counsel's argument ignores the testimony from Schill that he always had to "cycle in" new trucks annually in order to maintain the safety and efficiency of the company fleet and that Schill told Pavlish in the spring of 2009 that Schill would be doing so again. (Tr. 1011, 1012) Pavlish also testified about the regular need to replace the aging trucks "for the safety of the people... We can't have bad trucks on the road." (Tr. 1203) Thus, until CSI had located the appropriate new trucking company to take over its trucking needs, CSI could hardly ignore the ongoing and important equipment needs of its trucking department. These purchases do not demonstrate that closing the trucking department was a pretext for retaliation because these purchases were necessary – and contemplated – prior to the actual closing.

The General Counsel also inserted into her chronology of events the fact that the company unilaterally changed the health insurance benefits prior to closing down the trucking department. She incorrectly asserts this occurred July 28 (rather than Sept. 1, 2010) but does not explain how this conduct fits into her claim for retaliation, other than to claim that such action showed "disdain" for the union. The Respondent has made the ALJ's finding that the company violated the Act by making this decision a subject of its own exceptions, so the merits will not be argued herein. However, it is important to note the ALJ was keenly aware of this conduct too, yet still did not conclude the insurance dispute had anything to do with the subcontracting decision or was even evidence of anti union animus. He merely concluded the company should have provided the union with more notice of the problem with the health insurance premiums and therefore failed in its duty to bargain before implementing a new policy.

General Counsel further argues that the company's cell phone policies and enforcement of those policies demonstrates anti-union animus and were created in reaction to Mixon's strike "threats" (which the ALJ concluded were not even actual threats at all). Apparently, the thread of argument here is that the cell phone policy shows the company was so angered over the grievance and the strike threats that it desired to squelch all discussion between the truck drivers by enforcing the cell phone policy. However, the record demonstrates that the cell phone policy only prohibited the drivers from talking to each other *while they were driving a company vehicle.* It served safety concerns. The union drivers stumbled all over themselves in testifying whether they were told by company officials if they could not talk to each other at all using the company provided cell phones or only while driving. Even the ALJ found their testimony confusing and

inconsistent. To include the controversy over the cell phones as evidence of anti union animus is simply stretching the facts to implausible ends.

None of the cases cited in support of the General Counsel's argument compel this Board to reverse the ALJ's conclusion that Respondent met its burden of showing it would have closed its trucking department regardless of the activities of the union. For example, General Counsel argues the facts in the matter *sub judice* are similar to those in *Century Air Freight Inc.* 284 NLRB 730 (1987) where an employer was found to have violated Section 8(a)(3) of the Act by terminating its trucking division and subcontracting the bargaining unit work without bargaining with the Union and by discharging its unit employees to avoid the consequences of a threatened strike. However, the facts in that case established no prior efforts whatsoever by the company to subcontract the company's trucking work until a very explicit, heated discussion between management and employees concerning the likelihood of a strike if employees did not accept the company's request to extend the current contract. (Id at 732) Indeed, the decision indicates the company took its first steps to subcontract out the trucking work the *very same afternoon* of the heated discussion and had the arrangements for such subcontracting finalized a day or two later. There was even testimony indicating admissions by a management employee that the decision to "farm out the [trucking] work" was made in direct response to the union's threat to strike if they did not get a $2 raise. (Id at 733) The Board specifically concluded this Respondent had failed its burden of proof to come forward with evidence of any legitimate and substantial business justification for its conduct. (Id at 734)

These facts and conclusions can hardly be properly compared to the facts at bar. First, the ALJ herein concluded there were not even any actual strike threats made to Respondent CSI

prior to its commencement of substantial subcontracting in November, 2010, distinguishing between mere assertion of a right to strike (over the health insurance controversy) made by Mixon and an actual threat to strike. In *Century Air Freight* there was a direct and damning connection between the strike threat and the subcontracting decision; here the connection is all supposition and speculation.

Moreover, in *Century Air Freight* there had been no planning to subcontract out the trucking work prior to its implementation by the company; it was clearly a knee jerk reaction to the strike threat. Here, the facts demonstrated a decision by the owner in the spring of 2009 to commence closing the trucking department once a suitable replacement company or companies could be found. Documentary and oral evidence exists in this case highlighting the search for a new trucking firm or firms, with requests for quotes, meetings between the principals, and actual subcontracted work on a trial basis with at least two new companies in 2009, long before the union activities of November, 2010 or even the advent of the health insurance dispute in July, 2010. Such evidence of serious preparation for closing the CSI trucking department cannot be ignored, even if the company could have done even more by way of investigation before announcing its decision in January, 2011. *Century Air Freight* is hardly comparable.

General Counsel then tries to draw a distinction between this matter and the case of *Capital Transit*, 289 NLRB 777 (1988) where the Board reversed the ALJ and determined the company had not violated Section 8(a)(3) of the Act when it ceased using employee drivers and instead switched to leased drivers. The ALJ had concluded the company had wrongfully made this change in response to its employees' union campaign, but the Board recognized that the owner had already made the decision to utilize the new leasing arrangement, subject to certain

conditions being subsequently met. This Board stated "The issue is whether [the owner's] initial decision, which was not tainted by any motive proscribed by statute, was thereafter influenced by the organizational campaign that commenced among Capital Transit's employees." This Board concluded the owner's decision was not so influenced, stating

> Where, as here, an employer's initial decision to change the mode of operations is lawful, the Act does not prohibit the employer from carrying out that decision simply because the employer's employees choose to engage in union activities.

Respondent herein asserts this statement is equally applicable to the case at bar. If owner Ed Pavlish determined in the spring of 2009 that he wanted to close the trucking department of his company for legitimate business reasons and thereafter instructed his top operations officer to search and find suitable replacements, and such officer commenced to do so, but had not finished the job by the time certain grievances were pursued by two drivers in November, 2010, the Act does not prohibit this Respondent from carrying out Pavlish's decision simply because the union engaged in certain protected activities prior to such completion. ALJ Sandron has determined Pavlish was not actually influenced by the union activities which occurred in September and October of 2010 in making his decision; the decision to close the trucking department had already occurred by then and was merely holding for final selection.

General Counsel further argues that the CSI situation is akin to that found in *Masland Industries, Inc,* 311 NLRB 184 (1993) where the employer was found to have violated Section 8(a)(3) by *immediately* subcontracting out its trucking work after learning of the Union's request for recognition. The facts therein indicated the company had, prior to the union request for recognition, been pursuing a "two path solution" to its trucking cost problems, negotiating with its driver employees to change the compensation method for those drivers from hourly to

mileage, while also secretly exploring with a carrier the possibility for subcontracting the same work. The ALJ concluded the evidence of *knowledge, timing,* and *union animus* put forth by the General Counsel established a prima facie case for retaliation. He then went on at length reviewing the company's attempt to claim the decision would have been made regardless of the union activity, finding again and again that the company witnesses and explanations were not credible. He even found that the date of the trucking subcontract was contrived "in order to untruthfully conform to and support Respondents' assertions" that it had already begun the subcontract when the union recognition occurred. In short, that ALJ concluded that "the preponderance of credible evidence discloses it was Union Agent Clemmens April 27 requests for recognition that caused Respondents to terminate the 16 drivers and to subcontract" their trucking operations "rather than the reasons assigned by Respondents." (Id. at 219)

Thus, the *Masland* decision is ultimately very different than the matter before this Board because the ALJ herein did not find Pavlish's testimony that he had made the decision in early 2009 to close his trucking department to not be credible, nor did he find Pavlish's denial of a retaliatory motive for such closing to not be credible. In *Masland* there are repeated instances of the ALJ finding the company witnesses lacked credibility on the very issue of the motive for the company's decision. There is nothing comparable in the decision of Administrative Law Judge Sandron. Despite General Counsel's insistence that Judge Sandron failed to appreciate and credit certain facts and timing issues, the decision shows he was indeed aware of her arguments and facts, yet still credited the company's explanations. This Board ought not reach any different conclusions. The case law cited by General Counsel, if anything, supports affirmance of the ALJ herein.

B. THE ALJ DID NOT ERR IN FINDING THAT THE UNION HAD WAIVED ITS RIGHT TO BARGAIN OVER THE COMPANY'S DECISION TO CLOSE ITS TRUCKING OPERATIONS

General Counsel and the Respondent CSI do not disagree that a party may waive its right to bargain over an issue and that under Board decisions the Board will not infer a waiver absent "clear and unmistakable" evidence that the parties intended the result. *Metropolitan Edison Co. v NLRB,* 460 U.S. 693 (1983)[1] To meet this standard, the contract language must be specific *or* it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.,* 330 NLRB 1363 (2000) The ALJ indicated in his decision that he recognized this to be the standard, also adding "Waiver of statutory rights is not to be lightly inferred but instead must be clear and unmistakable." [citations omitted]. (JD 38: 26-33). He specifically acknowledged that waiver can occur by express provision in the collective bargaining agreement, by conduct of the parties, or by a combination of the two. (JD 38: 42-44).

General Counsel argues the ALJ erred in finding the Union waived its right to bargain over the decision to subcontract. She argues that to be an effective waiver, the management rights clause must expressly use the word "subcontract", that "subcontracting" is different than a "transfer" of work, and that any past instances of subcontracting the trucking work at CSI was limited to specific situations.

However, it is clear the ALJ did not, in fact, base his decision on whether or not the contract permitted "subcontracting". Instead, the ALJ determined that Respondent had the right

[1] Respondent notes that several Federal Circuit Courts of Appeal have rejected the "clear and unmistakable" standard and instead advocated normal "contract interpretation" standards. See *IBEW Local 47 v. NLRB*, 927 F2nd 635 (D.C. in 1999; *Chicago Tribune Co.* 304 NLRB 495, enf. denied in part, 974 F2nd 933 (7th Cir. 1992), *NLRB vs. U.S.P.S.* 8 F3rd (D.C. 1993). The Respondent reserves its right, and does in fact, to urge the adoption of the federal court's standards. Under either standard, however, the ALJ's conclusion would have been the same.

under the management rights clause of the contract to "terminate or eliminate all or any part of its work or facilities" and to "transfer any or all of its . . . work . . . to any other entity." The ALJ concluded ***"it is difficult to imagine parlance that could be any broader as far as granting the Respondent the right under the contract to close a particular operation."*** (Emphasis added). Thus, the ALJ ultimately stated "I conclude that the Union waived the right to engage in bargaining over the decision to *terminate the trucking division. . .*" (JD 39: 28, 29)

Although the Respondent posits that it does, the ALJ never concluded, as the General Counsel infers, that the contract gave the Respondent the right to subcontract out the entire trucking division. He determined instead that the company still had a contractual right to terminate its trucking department without bargaining beforehand.

Faced with clear and unmistakable language permitting the company to terminate or eliminate any of its work or facilities, and to transfer any of its work elsewhere, he concluded this management rights provision clearly permitted the company to close this particular department also (as it had done twice before involving other departments), even if it meant the same work would go somewhere else. In so doing, he found this contract language "akin to language that the Board found to be a waiver in *Allison Corp.*" and he expressly distinguished *Reece Corp.* (294 NLRB 448) upon which the General Counsel relies.

Nowhere does the General Counsel address in her brief the fact that the CBA specifically permits CSI to terminate or eliminate any of its work or facilities. Ignoring such language, and the ALJ's reliance upon it, she argues instead that other board decisions have relied upon specific expressions of "subcontracting" in the management rights clause to in order justify finding a waiver of subcontract bargaining.

The General Counsel's assertion is not necessarily true in any event: in *Shell Oil Co.*, 166 NLRB 1064 (1967) the Board concluded the union had waived its right to bargain about subcontracting even though the term "subcontracting" was not utilized in the management rights clause. Instead the Board construed a provision in the CBA addressing the minimum rates which would be charged for all work done under contract in the employer's facility as a waiver of the union's right to bargain over subcontracting.

Similarly, in a 1970 case, the Board determined a union had waived its right to bargain over the "transfer" of work by the company to a new location, even though that management rights clause did not expressly use the term "transfer." *Consol. Foods Corp.,* 183 NLRB 832 (1970) Recognizing that the management's rights provision therein afforded the company the "exclusive right" to change, modify, *or cease its operation, processes, or production, in its discretion*, the Board concluded:

> In our opinion, these clauses, in clear terms, afforded Respondent the right unilaterally to "change, modify, or cease. . .operation" *transferring the driving function* to the Centralia plant. (Id.)

In an *Advice Memorandum of Office of General Counsel*, NLRB, Cases 21-CA-36368, 36445, issued November 8, 2004, it was indicated that a management rights clause, similar to the one at bar, provided an employer with a clear and unequivocal right to eliminate its trucking operations and "hire a trucking firm" to do the same work which the bargaining unit had been performing. That clause afforded management the right to "create, change, combine or abolish jobs, departments and facilities" and also to "subcontract or discontinue work." See also: *NLRB v Challenge-Cook Brothers,* 843 F2d 230 (6th Cir. 1989) where the 6th Circuit found the union had clearly and unmistakably waived its right to bargain over the permanent transfer of work. "The

management rights clause in the present case gave the employer the right to make unilateral transfers of work from one plant to another and generally to make business decisions about what products would be manufactured and where." (Id, at 233)

Regardless of what the Board and the courts have found necessary in the language of a management rights clause to find, or not to find, a requirement to bargain over subcontracting, the General Counsel's brief still fails to address why the management rights provision herein does not permit CSI to "terminate" or "eliminate" its trucking department and to "transfer" such work to another entity. That is what the ALJ actually concluded. Thus, there is indeed a very clear contractual provision indicating CSI had an unfettered right under the management rights clause to terminate any of its business operations, as well as an unfettered right to transfer any of its work to anywhere else. Thus, Respondent, under Board law, could make the unilateral decision to close its trucking department and to transfer the work of such department wherever it might choose. This is all that occurred in this case. The General Counsel's insistence that such conduct could only occur if the management rights clause referenced "subcontracting" is simply not correct[2].

[2] It is Respondent's position the ALJ should have likewise concluded the management rights clause permitted the company to subcontract out trucking work without bargaining beforehand, even if such subcontracting did result in a complete closure of the trucking department. The ALJ did not reach any conclusion on this issue in his decision since he determined instead that the language of the management rights clause clearly and unmistakably permitted the company to close the trucking department without bargaining. Since the ALJ did not specifically address this in his decision, Respondent reserves its right to continue to maintain that subcontracting too, without bargaining, is permitted under this clause, even if such subcontracting does result in the complete closure of a department.

C. THE ALJ DID NOT ERR WHEN HE CONCLUDED THE RESPONDENT WAS NOT REQUIRED TO COMPLY WITH THE UNION'S INFORMATION REQUEST TO THE EXTENT THAT SUCH REQUEST DEALT WITH THE DECISION TO CLOSE THE TRUCKING DEPARTMENT

General Counsel asserts Judge Sandron should have found Respondent as violating Section 8(a)(1) and (5) of the Act when the Respondent failed to provide the union with information it requested pertaining to its decision to close the trucking department and/or subcontract. Specifically, the ALJ wrote:

> Since the decision to close the trucking division was made a nonmandatory subject of bargaining by virtue of the management-rights clause in the collective-bargaining agreement, and the Respondent was not obliged to bargain over the closure decision, it logically follows that the Respondent was not legally required to comply with the Union's information request to the extent that it dealt with the decision to close. See *Ingham Regional Medical Center,* 342 NLRB 1259, 1262 (2004); *BC Industries, Inc.*, 307 NLRB 1275, 1275 (1992).

Ignoring these cases cited by the ALJ in support of his decision entirely, General Counsel argues that case law precedent establishes an employer has the statutory obligation to provide, on request, relevant information that the union needs for proper performance of its duties as collective-bargaining representative, including the decision to file or process grievances. General Counsel further argues that where the union is obligated to establish relevance, it need only demonstrate a reasonable belief based on objective facts that the requested information is relevant. Respondent does not quarrel with these statements, but they do not go far enough in analyzing the ALJ's decision.

First it must be recognized that in *Ingham Regional Medical Center,* supra, the Board affirmed an ALJ's decision dismissing a claimed 8(a)(5) violation concerning a subcontracting decision without bargaining and a refusal by the employer to provide information requested by

the union pertaining to that subcontracting decision. After first determining that the company had the right under the CBA to subcontract out the work at issue (hospital "coding") the ALJ determined, and the Board affirmed, that the Respondent's failure to provide the requested information was not improper either.

> The Board has held that subcontracting information like that requested by the Union is not presumptively relevant and therefore a union seeking such information must demonstrate its relevance. *Sunrise Health & Rehabilitation Center,* 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete,* 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997). The finding made above that Respondent had no duty to bargain about the decision to subcontract means the Union cannot demonstrate the relevance of the requested information. I find, therefore, that the Respondent's failure to provide all the requested information is not a violation of the Act. *California Pacific,* supra. Accord, *Detroit Edison Co.,* 314 NLRB 1273 (1994).

Thus, there is precedent for Judge Sandron's decision. The key is that information requests for subcontracting information are not deemed to be automatically relevant in a labor dispute. As another example of this conclusion, in *Disneyland Park,* 350 NLRB 1256 (2007) the Board noted "information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, does not constitute presumptively relevant information." The Board went on to state "Therefore, 'a union seeking such information must demonstrate its relevance.'" While noting that this requirement is not "unduly restrictive" and that the union only need meet a liberal "discovery type standard", the Board also stated "a union must explicate the relevance of requested information with some precision, and a generalized conclusionary explanation of relevance is 'insufficient to trigger an obligation to supply information that is on its face not presumptively relevant.'"

There is no evidence in the record before this Board that Teamsters Local 507 ever explained with precision to the Respondent the relevance of its requests for information regarding the Respondent's decision to close the trucking department or to subcontract. As the ALJ's decision reflects, Respondent's attorney indicated to the union representative in January, 2011 that, other than information related to the effects of the closing, he deemed the rest of the requested information presented to the company to be irrelevant. (JD 29: 8, 9) The attorneys then met at lunch and the union attorney testified that Respondent's attorney made clear to the union attorney that the company would not bargain over the decision to close the trucking department. (JD 29: 20, 21) Thereafter, the union requested yet more information related to the company's decision to subcontract and, in response, Respondent's attorney indicated by letter dated January 31 to the union attorney that they had a "major disagreement" over whether or not the contract permitted the company to close the trucking department and that the company "was under no obligation to engage in bargaining over the decision or to provide any information regarding such decision." (JD 29: 35, 36) Thereafter, the company did provide to the union what it believed to be responsive to the effects bargaining, but nothing in response to the requests concerning the subcontracting.

The ALJ's decision does not reflect any further efforts by the union to "explicate" with precision to Colaluca, or anyone else at the Respondent company, the relevance of the union's requested information pertaining to the subcontracting or to the closing of the trucking department. This is because there was no further evidence put into the record below on this point. Without any evidence that the union provided such an explanation to the Respondent, the union here clearly failed to meet its duty imposed by the Board in *Disneyland Park,* supra.

Thus, it is not as simple or clear cut as the General Counsel portrays the issue in her brief. Information related to subcontracting issues is not presumptively relevant. A union is obliged to explain with precision to the company the relevancy of its subcontracting requests before the company can be found to be in violation of the Act for refusing to turn such information over. This step was never taken in this matter. Once the ALJ determined the requests were indeed irrelevant because the company had the contractual right to close the trucking department, the Respondent's refusal to provide such irrelevant information became excusable under these circumstances.

D. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENTS CSI AND TURN-TO, LLC SHOULD NOT BE CONSIDERED AS A SINGLE EMPLOYER OR AS ALTER EGOS.

General Counsel argues the ALJ erred when he did not find the Respondents as a "single employer" nor as "alter egos". However, in her brief, General Counsel focuses almost exclusively upon the "single employer" issue and does not articulate why the Respondents should also be considered as alter egos. The two doctrines are in fact different. In *NLRB v Hosp. San Rafael*, a case the Board has cited approvingly as summarizing the current status of the law, the First Circuit distinguished between the alter ego and single employer doctrines, stating that the alter ego doctrine involves situations in which "one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws", while the single employer doctrine "has its primary office in the case of two ongoing businesses which the NLRB wishes to treat as a single employer on the ground that

they are owned and operated as a single unit." 42 F.3d 45 (1st Cir. 1994) See also *Johnstown Corp.* 322 NLRB 818 (1997)

Of course, the criteria for determining "single employer" status and "alter ego" status are not identical. The Board has stated that two nominally separate employers will generally be found to be alter egos if they have "substantially identical: ownership, management, business purpose, supervision, operations, equipment, and customers." *Advance Electric, Inc.* 268 NLRB 1001 (1984) As the ALJ noted in his decision, in determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) functional interrelationship of operations, and (4) common control of labor relations. (JD 44: 12-14)

In determining that the Respondents were not a "single employer", the ALJ concluded that there was "common ownership" of the two companies, but he could not also conclude based upon the facts that there was a "functional interrelationship of operations" between the companies, nor "common management", nor "common control of labor relations."

The ALJ determined there was not "functional interrelationship of operations" between the companies because he first recognized the "only person connected with CSI" with whom Turn-To's sole employee, driver Jonathon Brown, has any contact is Pat Pavlish, his boss and owner of Turn-To. (JD 44: 37, 38) The ALJ noted that Brown, "in contrast" to the CSI drivers who "worked out of" the CSI plant, "making deliveries and returning", simply delivered chemicals to CSI from time to time while also performing trucking work for other customers in a "larger" geographical area than the CSI drivers. (JD 24: 5-11; 44: 39)) He further recognized that "[Brown] hauls in chemicals for CSI but does not carry out CSI products". (JD 24: 12) In other

words, the ALJ correctly determined that these two companies were performing trucking work in completely different ways for different customers, with the only common thread being the use of the same broker and Pat Pavlish having roles – very different roles – at each company. There was no evidence that CSI and Turn-To function together in any substantive fashion.

In concluding there was no "functional interrelationship of operations" between the two companies the ALJ further noted "a major aspect" of Turn-To's business "is the leasing of vehicles to CETCO, a function that CSI has never performed." (JD 44: 40, 41) He also recognized that Pat Pavlish operated out of a separate Turn-To office, that she had no office or desk at CSI, that nothing in the record suggested she had any interaction with CSI contract drivers or CSI employees, or that she played any role in CSI's personnel policies or practices. (JD 44: 42-44)

What evidence does the General Counsel offer to show "functional interrelationship of operations"? Essentially, these points: (1) that CSI's Jerry Schill first initiated the discussions of the sale or lease of the CSI trucking equipment to CETCO in February, 2011 and that Turn-To did not itself acquire that same equipment and begin selling and/or leasing that same equipment to CETCO until several months later; (2) that CSI's accountant and attorney, as well as an HR employee, first helped establish Turn-To; (3) that the two companies utilize the same truck broker to obtain clients; and (4) the trucks which Turn-To acquired from CSI, but which have not been leased or sold to CETCO or other third parties, are stored at the CSI facilities at no apparent cost.

These facts do not amount to enough evidence of a "functional interrelationship" between these two companies to justify a "single employer" status. At worst, they demonstrate that prior

to the formation of Turn-To, negotiations for the sale or lease of the trucking equipment had been started by an officer of CSI. However, the evidence also demonstrated that Schill eventually abandoned these efforts and turned over all discussions with CETCO to Pat Pavlish, who eventually consummated the CETCO contracts, after Turn-To had first acquired the trucks from CSI. (Tr. 823) Likewise, the common use of a truck broker, an accountant, and an attorney, between these two companies does not demonstrate a functional interrelationship if there is not further evidence of a comingling of the tasks, duties, and costs of such individuals. There is no such evidence in the record. Finally, the fact that unused former CSI trucks are still stored at the CSI facility by Turn-To demonstrates less a functional interrelationship between the two companies as it does the marital relationship of the principal owners of each company, a fact which the ALJ noted had helped him to conclude there was indeed a "common ownership" between the companies. (JD 44: 30, 31)

Moreover, it was not just the lack of a "functional interrelationship" between CSI and Turn-To which led the ALJ to conclude the General Counsel had not established a single employer relationship. Recognizing there needs to be evidence of "common management" and evidence of "common control of labor relations" between the companies as well, the ALJ determined there was no evidence that Ed Pavlish "plays any role" in the management of Turn-To, or that anyone other than Pat Pavlish "controls Turn-To's labor relations." (JD 44: 47-48) Faced with these rather unassailable conclusions, General Counsel dismisses their importance by claiming that because Turn-To only has one employee, the fact that Ed Pavlish is not involved "with labor relations" at Turn-To "is not dispositive evidence." (Brief, page 39) Still, since common management and common control of labor relations are two of the four listed factors

influential in determining "single employer" status, these facts ought to be recognized as true and therefore very relevant to the discussion.

Faced with bad facts on the single employer status issue, General Counsel mixes in one further argument, relevant to the "alter ego" issue, but not necessarily to the single employer issue. Specifically, General Counsel argues that Turn-To was created to avoid a "full unfair labor practice" restoration remedy. (Brief, page 39) Claiming there "could be no other reason to create Respondent" Turn-To, but "to avoid the restoration remedy that Respondents knew might well result from the Union's ULP filings", General Counsel asserts Respondents conduct was simply designed to "dispose" of CSI's trucking assets at "bargain prices". The ALJ considered this theory and specifically rejected it in his decision. (JD 45: 34-41). He concluded that the creation of Turn-To "represented another effort to maximize the profitability of the Pavlishs' business operations" rather than any scheme to avoid CSI's responsibilities under the Act. (Id).

Respondents would point out there is no evidence in the record to directly support the General Counsel's theory regarding the motivation behind creating Turn-To. Instead, she argues the "timing" and the "bargain prices" of the trucks sold to Turn-To demand such a conclusion. As to timing, the facts demonstrate contract carriers were already performing most of the company's work by the time Turn-To was created in the summer of 2011. Thus, CSI no longer had need of its trucking equipment. Indeed, as General Counsel herself repeatedly points out, Jerry Schill had been exploring disposal of CSI's trucking equipment through either lease or sale since February, 2011. It would have been far stranger if the company had not tried to find some way to sell off or lease equipment it no longer needed after closing its trucking department. No

case law or Board precedent requires a company to freeze its assets simply because an unfair labor practice has been filed.

Secondly, the ALJ never determined the company sold its assets at "bargain prices"; this is the claim of the General Counsel. Her brief cites but two of the twenty-eight equipment transactions listed on Respondent's Ex. 136 to support her theory that Turn-To did not pay fair market value for CSI's trucking equipment. Nor did the General Counsel submit any other evidence at the hearing to challenge whether or not these transactions truly reflected fair market value, as Respondents claimed. Indeed, contrary to the assertion in her brief, the Respondents did present testimony to the ALJ indicating the purchase/sale amounts were determined after CSI employees consulted local truck brokers regarding market values and performed an internet search, and after Debevec created a list of depreciation and book values for each piece of equipment as additional background information for CSI management to consider. (tr. 1129, 1130, 1109-1112) The General Counsel has selectively chosen two trucks (mis-identifying #49 as #48) and notes how long each truck was in service prior to sale to Turn-To. For example, she claims in the brief that Unit # 48 was purchased in August, 2010 and sold one year later for substantially less than the original purchase price. However, there is no evidence in the record indicating when this unit was in fact purchased in 2010 (a 2010 model could have been purchased in 2009), nor how many miles it had on it by the time of the sale, or anything else to legitimately challenge Respondent's fair market value conclusion. Such flimsy evidence can hardly serve as a basis to determine Turn-To was created solely in order for CSI to avoid its potential restoration responsibilities. What Respondent's Exhibit 136 does indicate is that *in toto* Turn-To paid considerably more for the trucking equipment listed than the book value of such

equipment ($399K versus $219K) This fact indicates CSI received more for the equipment than justified by book value.

In fact, even if General Counsel's speculation regarding market value and the motivation for the creation of Turn-To is accurate, which the Respondents deny, General Counsel has not addressed the other elements usually necessary to find an alter ego relationship: to wit, substantially identical "management, business purposes, operations, equipment, customers, supervision, and ownership. *McCarthy Construction Co.,* 355 NLRB 50, 51 (2010) The ALJ considered these indicia and still concluded CSI and Turn-To are not alter egos. (JD 45: 8-43). General Counsel has not attempted in her brief to identify facts in the record establishing a different conclusion is warranted.

E. THE ALJ CORRECTLY FOUND THAT RESPONDENT CSI DID NOT VIOLATE THE ACT BY CONDUCT RELATED TO ITS CELL PHONE POLICY OR RELATED TO ITS PRE-TRIP INSPECTION POLICY

The General Counsel asserts the ALJ should have found Respondent in violation of Section 8(a) (1) and (5) of the Act due to Respondent's conduct over its cell phone policy and a pre-trip inspection policy. This response shall first address the pre-trip inspection controversy because it seems the only real issue regarding it is whether the ALJ correctly decided that even though the company had unilaterally changed the pre-trip inspection policy without bargaining beforehand, such failure did not amount to a violation of the Act because the change was not a "material, substantial, and significant one." As the ALJ noted, an imposed change must be material, substantial, and significant in order to be considered a change in the employees' terms and conditions of employment which the employer must bargain over before implementation.

Crittendon Hosptial, 32 NLRB 686 (2004); *Berkshire Nursing Home, LLC,* 345 NLRB 220 (2005)

As the ALJ found, the change to the pre-trip inspection policy imposed by the company was simply this: if a pre-trip inspection of the truck by the driver took more than 30 minutes to conduct, the driver needed to report to management by the end of the day the fact that his pre-trip inspection had taken more than 30 minutes. (JD 8: 29, 30) The fact that the inspection took more than 30 minutes was not itself made a violation of any work rule, just the failure to report the incident. Analogizing this fact pattern to a 2010 NLRB decision, where a unilateral change, requiring all employees to advise that they were going to be unable to finish a job, was found to not rise to the level of a "material, substantial, and significant change" warranting a violation of the Act, Judge Sandron recommended dismissal of this 8(a)(5) and (1) charge over the pre-trip inspection policy. (*El Paso Electric Co.,* 355 NLRB 544 (2010)) General Counsel in her brief fails to articulate why this minimal new requirement, to report an inspection which takes longer than 30 minutes, amounts to a material, substantial, and significant change to the terms and conditions of the CSI drivers. The fact that discipline could be imposed upon drivers who failed to adhere to this policy- to report a longer than 30 minute inspection- does not make the policy itself a material, substantial, and significant change to the terms of the drivers' employment. The General Counsel's opinion on this point is obviously different than Judge Sandron's opinion, but that alone does not make the ALJ wrong nor does it require this Board to ignore the existing precedents on this legal question. The Board should adopt the ALJ's opinion.

The ALJ reached his conclusion that the Respondent had not violated the Act due to its cell phone policy under a completely different rationale. Here, the ALJ determined the

Respondent had not even made a unilateral change to the cell phone policy for the drivers. Finding that he could not determine the exact nature of the cell phone policies of the company before a Sept. 2, 2010 memorandum from the company to the drivers because the only witness testimony on the point was "confusing", and further noting no grievance nor ULP had been filed by the union after such memorandum was issued, the ALJ concluded Schill's repetition of the September 2 memorandum with drivers in October training sessions did not constitute any unilateral change. (JD 47: 36-48)

General Counsel argues the ALJ missed the fact that testimony established a past practice by the drivers of talking to each other on the phones. However, the ALJ noted that "Griffith's testimony on the subject of cell phones was confusing because he jumped back and forth in terms of the sequence of events and was unclear whether Schill stated that drivers should not talk to each other while driving the vehicle or at any time while they were on the road. (JD 5: 34-36) The ALJ specifically concluded "Griffith's testimony of the cell phone policy prior to September 2 was somewhat contradictory", pointing out that Griffith claimed a prior dispatcher, McNutt, had issued a memorandum in 2000 stating there was no problem if drivers talked among themselves on the cell phones, but that Griffith also testified McNutt had stated the phones were not for personal use but were only for emergency purposes or to contact the company. (JD 5,6: 40-3) The ALJ even credited Griffith's testimony that the drivers' practice had been to use the cell phone to get directions and information about customers. (JD 7: 25, 26) The ALJ just could not find that the Sept. 2010 memorandum's instructions to not use the cell phones *while driving*, and Schill's subsequent October, 2010 training sessions with the drivers repeating this instruction, truly amounted to a unilateral change. In short, no witness had established to the

ALJ's satisfaction that the company's drivers could always talk on the phone whether driving or not.

Thus, to a large extent, the ALJ reached his conclusion because General Counsel's sole witness on the question failed to clearly articulate what was different or new about the cell phone policy. He recognized that Griffiths claimed the memorandum changed the policy by not allowing talking while driving, (JD 7: 23, 24) yet this testimony alone was not enough to clear up the confusion Griffiths himself generated. Moreover, the ALJ noted twice in his decision that the union had not grieved the September memorandum, which expressly prohibited use of cell phones while driving. (JD 7: 26; JD 47: 43) This latter point undoubtedly influenced the ALJ into concluding the union itself did not see the memorandum as a unilateral change either. Perhaps the ALJ just could not bring himself to second guess such an obvious safety measure without clear-cut evidence the company had ever condoned a practice of drivers talking on their cell phones while driving their trucks in the first place.

Accordingly, this Board should affirm the ALJ on both of these points, despite General Counsel's exceptions.

F. CONCLUSION

The Board should overrule the exceptions submitted by General Counsel and affirm the ALJ's decision on the issues raised by such exceptions. The Collective Bargaining Agreement's Management Rights Clause clearly and unmistakably permitted Respondent CSI to close its trucking department and to transfer such trucking work elsewhere without bargaining with the union beforehand. The owner's decision to close the department was not improperly motivated

by any retaliatory motive or anti union animus, but rather for legitimate business reasons. Such closure would have occurred even in the absence of any union protected activities which preceded the actual closure because the company's owner had long beforehand decided to take such action and the subsequent union activities at issue did not influence him in such decision. The ALJ's decision in this regard rested largely on his resolution of the credibility of several company witnesses, including the owner himself, and this Board should therefore refuse to overturn those resolutions.

Furthermore, the Respondent did not violate the act by refusing to provide information requested by the union concerning the decision to close because such information, at the time of the requests, was not presumptively relevant and the union never sufficiently articulated any explanation to the Respondent why such information was relevant. Also, Board precedent establishes that if the requested information turns out to be irrelevant, as in the case herein, there is no violation of the Act arising from the refusal to provide such information to the union.

Likewise, the ALJ's recommendations regarding the Respondent's cell phone policy and pre-trip inspection policy should be affirmed as the evidence supports such recommendations there was insufficient proof the cell phone policy had been unilaterally changed by the Respondent. The new pre-trip inspection rule was too trivial to be considered as altering the terms and conditions of employment of the bargaining unit members.

Finally, the facts demonstrated that Respondents CSI and Turn To were neither a "single employer" nor "alter egos". The ALJ's decision that Turn To was formed to enable the owner to profitably dispose of the trucking equipment, that Turn To was indeed a separate new company

under different management and control, and that it was not created to thwart any potential restoration remedies of the union is supported by the facts and should be affirmed.

Respectfully submitted this 26th day of July, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing, *Respondent's Answer Brief to Exceptions of Counsel for the Acting General Counsel and Brief in Support*, was served via regular U.S. mail, postage pre-paid, or where permitted, by email, on this 26th day of July, 2012 to the following:

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